

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF AND APPENDIX FOR APPELLANT

FILED OCT 28 1943

IN THE

Joseph W. Stewart
United States Court of Appeals
for the District of Columbia

CLERK

OCTOBER TERM, 1943

No. 8234-8538

94

GEORGIANA HAMILTON

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

CHAUNCEY D. ARTIS,
512 Fifth Street N.W.,
Washington, D. C.,

Attorney for Appellant.

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IN THE
**United States Court of Appeals
for the District of Columbia**

OCTOBER TERM, 1943

No. ~~8334~~ 8534

GEORGIANA HAMILTON
Appellant

v.

UNITED STATES OF AMERICA
Appellee

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the Municipal Court of Appeals of the District of Columbia, which dismissed an appeal from the Municipal Court of the District of Columbia. The Municipal Court had jurisdiction under Public Law No. 512, 77th Congress, Ch. 207, 2nd Session, H. R. 5784. The Municipal Court of Appeals had jurisdiction under Public Law No. 512, 77th Congress, Ch. 207, 2nd Session, H. R. 5784, approved April 1, 1942. This court has jurisdiction to review the judgment under Sec. 8, Act of April 1, 1942, C. 207, 56 Stat. 190, 196.

STATEMENT OF THE CASE

On the 7th day of November, 1942, two informations were filed against the defendant Georgiana Hamilton, by the United States. One information charged that the defendant, with force and arms, and on the 200 block of C Street, Southwest, did then and there, unlawfully invite, entice, and persuade and address for the purpose of inviting, enticing, and persuading an adult person, to wit, J. R. Allen, to accompany her, go with her, follow her, for the purpose of prostitution or for some other lewd or immoral purpose; the other, charged that the defendant did then and there unlawfully, have in her possession, knowingly, a certain ticket, certificate, bill, slip, token, paper, writing, and other device used and to be used, adopted, devised, and designed for the purpose of playing, carrying on, and conducting a lottery and the game or device commonly known as policy lottery or policy.

The defendant on November 7, 1942, entered a plea of "NOT GUILTY" to both charges; she was tried and sentenced to serve 90 days on each charge, to which an appeal was noted.

At the trial, Officer J. R. Allen, Metropolitan Police Force, testified that at about 11:30 P.M. on the night of November 6, 1942, he was walking in the 200 block of C Street, Southwest, when the defendant called to him and said, "YOU had better go down the street, because the girls down there all know that you are a policeman"; that defendant then said "How much do you want to spend for a good ——— (using a word which it is agreed imported sexual intercourse); that the officer said he would be willing to spend \$2.00 and asked the defendant, "Where do we go from here, we can't do it in the street"; that defendant said "In my house," and started to turn into the yard at 229 C Street, Southwest, where she was placed under arrest by the witness; that a police cruiser, driven by Sergeant Howe, in company with Officer Eastman, was driving past and wit-

ness hailed them and put the defendant into the car and took her to No. 4 Police Station, where he searched her pocketbook and found a book of lottery or number slips.

Upon cross-examination, Officer Allen testified that he searched the pocketbook of the defendant at No. 4 Precinct and took out an Hawaiian dollar bill; he further testified that two officers had put him out of a car down the street before he met the defendant, but they were not witnesses in the case; that he had information that she peddled "dope" (a narcotic drug). He denied that he had her searched at the Women's Bureau for narcotics or that he had requested a physician to examine her to determine if she used drugs.

The defendant, being called as a witness in her own behalf, testified that she was waiting for a taxi when three officers, Blick, Allen, and one that she knew by the name of "Smiley," drove up; that one of the officers called her to the car; that she walked to the car knowing them all and knowing that they knew her; that Officer Allen took hold of her and pushed her into the car; that he took her pocketbook and searched it and asked her where the "dope" was; that he searched her at the precinct and notified the Women's Bureau; that he took an Hawaiian dollar bill out of the purse; that the same was a souvenir sent to her by a soldier; that one of the officers at the precinct said, "What are you going to charge her with?" and Officer Allen said, "Put soliciting against her, she has a long record. It will stick"; that they took a book containing lottery or number slips out of her purse; that at the Women's Bureau, she was searched and examined by a physician to see if she was a user of "dope."

That after argument of counsel, the Court found the defendant guilty and said, "Georgiana, you have a long record of convictions for offenses of this kind and I am going to put you out of circulation for a while." The Court thereupon sentenced the defendant to serve a term of 90 days in each of the two cases.

That on November 7, 1942, defendant was tried and sentenced and on November 9, 1942, defendant was released on an appeal bond. That on November 12, 1942, defendant filed a motion for a new trial with supporting affidavits and the same was heard on November 14, 1942, and denied on November 18, 1942; that a notice of appeal was filed on November 13, 1942.

(Record, Statement of Proceedings and Evidence.)

STATUTE INVOLVED

Sec. 22-2701 (6:177a). Prostitution—Inviting for Purposes of, Prohibited.

It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing, of persuading any person or persons, in or upon any avenue, street, road, highway, open space, alley, public square, or inclosure in the District of Columbia, to accompany, go with, or follow him or her to his or her residence, or to any other house or building, inclosure, or other place, for the purpose of prostitution, or any other immoral or lewd purpose, under a penalty of not more than \$100 or imprisonment for not more than ninety days, or both.

STATEMENT OF POINTS

1. The Municipal Court of Appeals erred in admitting the certificate of the trial Judge over the objection of the appellant.

2. The Municipal Court of Appeals erred where it failed to find that the denial of the motion for a new trial by the trial Judge was "plainly wrong" or an abuse of discretion.

3. The Municipal Court of Appeals erred when it held that it could not hear the appeal because the notice of appeal was filed during the pendency of a motion for a new trial.

4. The Municipal Court of Appeals erred when it held in substance that the filing of a motion for a new trial extended the time for filing the notice of appeal.

5. The Municipal Court of Appeal erred when it failed to decide whether the facts presented made out a case of soliciting prostitution.

SUMMARY OF ARGUMENT

1. The Municipal Court of Appeals for the District of Columbia should consult counsel representing both parties before obtaining a supplemental record, and, if the same is objected to, it should not be received until the objections are settled. To do other than this is contrary to general law, public interest, and previous decisions of this Court.

2. It was error for the lower court not to declare that the judgment of the trial court was plainly wrong or an abuse of discretion. It was an error for the lower court to fail to review and evaluate the proposed new evidence and thereby depart from one of the functions for which it was established. The lower court's action in this instance will affect the rights of numerous litigants who depend upon it for just relief.

3. The lower court was established in the interest of justice so that the rights of numerous citizens might be declared and had without being hindered by unreasonable technicalities. To depart from this function is such error as to call for an exercise of this Court's power of supervision.

4. Where a judgment of guilty has been entered, the defendant sentenced, committed, and released on a appeal bond, which is conditioned upon the appearance of the defendant 10 days from the date thereof to abide by the judgment of the court, the filing of a motion for a new trial does

not keep the Municipal Court of Appeals from taking jurisdiction, if the notice of appeal is timely filed.

The question of procedure has not been decided in this particular case and, therefore, this Court should settle it.

5. The act of the petitioner as related by the officer is not soliciting prostitution within the meaning of the act. Because Washington is the Capital of a great nation at war, numerous women are necessarily on the streets alone, therefore, this question should be decided as a matter of public interest.

ARGUMENT

1. The Municipal Court of Appeals is in error when it directs the trial court to file a supplemental record showing the grounds for its denial of a motion for a new trial when the record fails to disclose same unless counsel for the petitioner is given an opportunity to consent or object to the same. Such practice will open the door to endless misunderstandings. In this case, the trial judge furnished a certificate as to why he denied the motion. The petitioner knew nothing about such action until his counsel was sent a copy of the certificate by the trial judge, to which counsel promptly objected. (Appellant's Appendix, p. 24.) It is pointed out here and now that counsel for the petitioner was of the opinion that the trial judge would not hear the motion on its merits because the trial judge held that he could not entertain same when an appeal bond had been given. The motion was heard on November 14, 1942, and counsel was given until November 18, 1942, to find some law to support the theory that Court could entertain said motion. He found none and the motion was denied. (Appellant's Appendix, p. 24.) The Municipal Court of Appeals did not follow the case of *Thomas vs. U. S.*, 64 App. D. C. 167, 121 F. 2d 905, for in that case the Court said:

“In the interest of Justice and upon a stipulation of Counsel representing both parties, this court remanded the case to the Trial court for the purpose of hearing again the motion for a new trial.”

It was error for the lower court not to send this case back to the Municipal Court of the District of Columbia in the same manner.

2. The evidence, offered in the affidavits that supported the motion of a new trial, is more than cumulative. At the trial of the case the court said, “Georgiana, you have been getting away a long time. I’m going to put you out of circulation for a while” and the Municipal Court of Appeals has said her convictions would affect her credibility (Appellant’s Appendix, p. 18), therefore, I say, this evidence, coming from disinterested persons with no records, is, “‘newly discovered’ under the decided cases, and that fairly considered, the testimony, if received, would have been likely to require an acquittal.” (Appellant’s Appendix, p. 22.) The dissenting opinion of the Municipal Court of Appeals continued,

“I cannot agree with the statement in the majority opinion that we are not in a position to ‘evaluate’ the proposed new evidence. This is relinquishing, without reason, one of our plain functions as a reviewing court. The two witnesses were never summoned into court for examination or cross-examination. The trial judge never saw nor heard them and made his ‘evaluation’ of the proposed testimony solely from the affidavits. Those affidavits are before us and appellant is entitled to have us review them. If at the trial defendant had been corroborated by those two witnesses, is it likely that the trial judge would have rejected such persuasive testimony, establishing as it did that there was neither time nor opportunity for solicitation? Looking at the picture as presented, I am satisfied that the refusal to grant a new trial constituted an abuse of discretion.”

In the case of *Stockwell vs. Railway Co.*, 43 Iowa 470, the Court said:

“The ruling upon a motion for a new trial involves the exercise of discretion, and the action of the trial court will not be disturbed unless abuse of discretion is shown. Much latitude is allowed the trial court in the exercise of its discretion, yet such is a legal discretion, and when the precise ground is stated upon which the court bases its action we will determine if such discretion has been abused. It is our duty to determine from this record whether there was legal error by the trial court in its ruling.”

Nelson vs. Telegraph Co., 162 Iowa 50;
Turly vs. Griffin, 106 Iowa 161.

In *Langes vs. Green*, 282 U. S. 531, the Court said:

“Discretion where invoked as a guide to judicial action means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge.”

Again in *Mulong v. Mulong*, 178 Iowa 552, the Court said:

“Of course a motion for a new trial is addressed to the sound discretion of the trial court; but this is a legal discretion, and subject to review by us; and this court reviews a case with greater care where a new trial is denied than where it is granted, for the reason that, where denied, the case is at an end, while, if granted, a new trial is had.”

It was error, therefore, for the lower court to decide that the judgment was not plainly wrong or an abuse of discretion.

3. Again, I quote from the dissenting opinion (page 4, 1 Municipal Court of Appeals opinion) which said:

“Notice of appeal was timely, having been filed within five days from the judgment of conviction. Appellant should not be penalized for having filed it before the motion for new trial had been acted upon. Had a new trial been granted, appellant could have withdrawn the notice of appeal. Congress reestablished the right of appeal in these cases when it created this court a year ago, and we should not destroy that right by technical restrictions.”

It was the duty of the lower court to see to it that the petitioner got a fair and just trial and the lower court erred when it refused to do so by hiding behind technicalities.

4. It was error for the Municipal Court of Appeals to refuse to hear the appeal. I refer you to the bond given by appellant. (Appellant's Appendix, pp. 26, 28.)

Having given this bond the defendant had to appear, within five days next after expiration of 10 days from November 7, 1942, and serve sentence unless her notice of appeal was filed. I do not think the motion for a new trial stopped the time from running. The appeal in this case was a matter of right. There was nothing to gain by filing both. The answer to the whole situation is this: Defendant did not know of the new evidence until released on Appeal Bond. Having found new evidence she filed her motion but she had to act within ten days on her notice of appeal.

The petitioner takes the position that after she was found guilty, sentenced, committed, and released on an appeal bond, the trial court could not entertain a motion for a new trial. The trial court took the same position at the hearing of the motion. (Appellant's Appendix, p. 24.) If the trial court had heard the motion on its merits and denied it, he could not have committed the petitioner because she was on an appeal bond. Therefore, petitioner contends the lower court erred when it refused to hear the appeal because a motion for a new trial had been filed and not disposed of when the notice of appeal was filed.

5. According to the testimony of the officer, did the appellant unlawfully invite, entice and persuade, and address for the purpose of inviting, enticing and persuading an adult person, to wit, J. R. Allen to accompany her, go with her, following her for the purpose of prostitution * * * ? The appellant told the policeman, "Why don't you go down the street, the girls all know you are a policeman." She did not entice, invite or persuade at that time, instead the officer set a trap himself. He said, "I'm no policeman." At that time the officer was inviting or trying to entrap the appellant. Any conversation after the appellant's first statement is the result of the officer's invitation. Had he moved on at the girl's suggestion, nothing would have happened. Her next statement is not one of solicitation. She said, How much do you want to spend? etc., but she said it in a manner so as to take it out of the category of solicitation or inviting. The officer says he will spend two dollars, but she does not accept, instead the officer is persistent and says, "We can't do it here, where do we go?" She is not asking him to follow her. There is no meeting of the mind on the price and the officer has done the soliciting. This case should have been dismissed. The petitioner contends that this is not solicitation within the meaning of the law.

CONCLUSION

It is the petitioner's purpose in this brief to exhibit concisely that the decision of the lower court was contrary to general law and previous decisions of this court. It is important because the future policy of the Municipal Court of Appeals as to technicalities should be settled by this court.

Respectfully submitted,

CHAUNCEY D. ARTIS,
512 Fifth Street N.W.,
Washington, D. C.,
Attorney for Appellant.

APPENDIX

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APPENDIX TO BRIEF FOR APPELLANT

I

PLEADINGS AND OTHER PAPERS DESIGNATED BY APPELLANT

1 Municipal Court of the District of Columbia

November Term, A. D. 1942

District of Columbia, ss:

Edward M. Curran, Esquire, Attorney of the United States in and for the District of Columbia, who, for the said United States, prosecutes in this behalf, by John B. Diamond, Esquire, one of his assistants, comes here into Court, at the District aforesaid, on the seventh day of November, in the year of our Lord one thousand nine hundred and forty-two, in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one J. R. Allen that one Georgiana Hamilton late of the District aforesaid, on the sixth day of November in the year of our Lord one thousand nine hundred and forty-two with force and arms, at the District aforesaid, and within the jurisdiction of this Court, did then and there unlawfully, have in her possession knowingly a certain ticket certificate, bill, slip, token, paper, writing, and other device used and to be used, adapted, devised and designed for the purpose of playing, carrying on, and conducting a lottery and the game or device commonly known as policy lottery or policy against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Georgiana Hamilton in this

behalf to make her answer to the said United States touching and concerning the premises aforesaid.

EDWARD M. CURRAN
*Attorney of the United States
in and for the District of Columbia.*

By JOHN B. DIAMOND
His said Assistant.

Personally appeared J. R. Allen before me this seventh day of November, A. D. 1942, and being duly sworn according to law doth declare and say that the facts as set forth in the foregoing information are true.

(signed) RAY L JENKINS
*Assistant Attorney of the United States
in and for the District of Columbia.*

Filed Nov 7 9:59 AM '42

WALTER F. BRAMHALL
*Clerk of Municipal Court
Washington, D. C.*

[Endorsed on back:]

McMahon, Judge
DB

No. 425316

UNITED STATES

vs.

GEORGIANA HAMILTON
*Possession of Number Slips
Atty. C D Artis*

Witnesses: J. R. Allen, DB
Nov 7-1942

Plea Not Guilty
Jury Trial demanded
Contd for 11/18/42

Bond \$500 TKC

Demand for Jury Trial Withdrawn

Judgment Guilty

90 days TKC JP McM

after 425317

Com AB

Appeal Bond 500 TKC JP McM

11-9-42 JW Stewart, Surety

11/11/42—Motion for new trial filed this day Cont 11/28/42
for hearing TKC

11/12/42—Affidavits for deft filed this day. Motion Hear-
ing on motion now set for 11/14/42 TKC

Nov 14 1942—Cont 11/17/42 for deft TKC JP McM

Nov 18 1942—Motion for new trial overruled. TKC JP
McM

Nov. 13, 1942—Notice of Appeal filed. A.L.C.

Nov. 18, 1942—Designation of Record and Statement of
Errors filed. A.L.C.

425316

Nov. 23, 1942—Statement of Proceedings and Evidence filed,
and submitted to the Trial Judge. A.L.C.

Dec. 10, 1942—Statement of Proceedings and Evidence set-
tled and approved by the Trial Judge. A.L.

2 Property of the Police Court of the District of Columbia

District of Columbia, ss:

November Term, A. D. 1942

Edward M. Curran, Esquire, Attorney of the United States in and for the District of Columbia, who, for the said United States, prosecutes in this behalf, by John B. Diamond, Esquire, one of his assistants, comes here into Court, at the District aforesaid, on the seventh day of November, in the year of our Lord one thousand nine hundred and forty-two, in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one J. R. Allen, that one Georgiana Hamilton

late of the District aforesaid, on the sixth day of November in the year of our Lord one thousand nine hundred and forty-two with force and arms, at the District aforesaid, and within the jurisdiction of this Court, and on the 200 block of C St., Southwest, did then and there unlawfully invite, entice, persuade, address for the purpose of inviting, enticing and persuading an adult person, to wit: J. R. Allen, to accompany her, go with her, follow her for the purpose of prostitution or for some other lewd or immoral purpose against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Georgiana Hamilton in this behalf to make her answer to the said United States touching and concerning the premises aforesaid.

EDWARD M. CURRAN
*Attorney of the United States
in and for the District of Columbia.*

By JOHN B. DIAMOND (signed)
His said Assistant.

Personally appeared J. R. Allen before me this seventh day of November, A. D. 1942, and being duly sworn according to law doth declare and say that the facts set forth in the foregoing information are true.

(signed) RAY L. JENKINS
*Assistant Attorney of the United States
in and for the District of Columbia.*

Filed Nov 7 9:59 AM '42

WALTER F. BRAMHALL
*Clerk of Municipal Court
Washington, D. C.*

[Endorsed on back:]

DB
McMahon, Judge
No. 425317
UNITED STATES

vs.

GEORGIANA HAMILTON (7)
Soliciting Prostitution
Atty. C. D. Artis

Witnesses: J. R. Allen, DB

Nov 7 - 1942

Plea Not Guilty

Judgment Guilty

90 days TKC JP McM

See 425316

Com AB

Appeal Bond 500 TKC JP McM

11-9-42 JW Stewart-Surety

11/11/42—Motion for new trial filed this day Cont 11/28/42
for hearing TKC

11/12/42—Affidavits for deft filed this day Hearing on
motion now set for 11/14/42 TKC

Nov 14 1942—Cont 11/17/42 for deft TKC JP McM

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McM

Nov. 13, 1942—Notice of Appeal filed. A.L.C.

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425317

Nov. 23, 1942—Statement of Proceedings and Evidence filed
and submitted to the Trial Judge. A.L.C.

Dec. 10, 1942—Statement of Proceedings and Evidence set-
tled and approved by the Trial Judge. A.L.C.

* * * * *

3

Motion for New Trial

Now comes the defendant, Georgiana Hamilton, through her attorney, C. D. Artis, and moves the Court for a new trial for the following reasons, to wit:

1. That the verdict was contrary to law.
2. That the verdict was contrary to the weight of the evidence.
3. That the defendant has discovered new evidence that was not available to her at the time of trial; that the affidavits of two witnesses are hereto attached and prayed to be made and read as a part hereof.
4. And for such other and further reasons that may be advanced at the hearing on this motion.

(signed) C. D. ARTIS

512 5th St. N. W.

Attorney for defendant.

To the Assistant U. S. District Attorney,
Sir:

Please take notice that the foregoing motion will be called to the attention of the Court on the 28th day of November, 1942, or as soon thereafter as the same may be heard.

(signed) C. D. ARTIS

Attorney for defendant

Service of Copy acknowledged:

By R. R. HORNER (signed)

Assistant U. S. District Attorney

Filed Nov 11 12:16 PM '42

* * * * *

4

Affidavit of Georgiana Hamilton

I, Georgiana Hamilton, being first duly sworn according to law, depose and say that I am the defendant in the above entitled case; that I did not produce the witness, Marie Belt, at the trial of my case because I was locked up and

thought that she had gone to the hospital to give birth to a baby as she had told be the night before, just before the officers arrested me,

That I did not know that the witness, Thelma Matthews, had seen the incident at the time of my trial; that I found out that she witnessed my arrest when I was released on bond Monday, November 9, 1942; that my trial was had on Saturday, November 7, 1942.

(signed) GEORGIANA HAMILTON

Subscribed and sworn to before me this 12th day of November 1942.

(signed) BROOKS T. SANDERS

Notary Public, D. C.

(Seal)

Brooks T. Sanders
Notary Public
District of Columbia

Filed Nov. 12, 1942

* * * * *

5

Affidavit of Marie Belt

I, Marie Belt, being first duly sworn according to law, depose and say that I am in the Hospital and that I told the defendant, Georgiana Hamilton, Friday night that I was expecting to go to the Hospital to give birth to a baby; that I had talked with her just before a car drove up and called Georgiana to it; that I saw one of the men snatch her pocket book, look in it, push her in the car, and drive away; that I am a married woman, the mother of four children, with no police record.

(signed) MARIE BELT

Subscribed and sworn to before me this 11th day of Nov., 1942.

(signed) SYME L. JENNIFER

(Seal)

Notary Public, D. C.

Syme L. Jennifer
 Notary Public
 District of Columbia
 Filed Nov 12 1942

* * * * *

6 *Affidavit of Thelma Matthews*

I, Thelma Matthews, being first duly sworn according to law, depose and say that I saw Georgiana Hamilton when she was called to a car occupied by certain police officers on Friday night, November 6, 1942; that I saw one of them grab her pocket book and push her into the car; that Georgiana did not know that I saw what happened until she was released on bond, Monday, November 9, 1942.

(signed) THELMA MATTHEWS

Subscribed and sworn to before this 11th day of November, 1942.

(signed) SYME L. JENNIFER
Notary Public, D. C.

(Seal)

Syme L. Jennifer
 Notary Public, D. C.
 District of Columbia
 Filed Nov. 12, 1942

* * * * *

7 *Notice of Appeal*

Filed Nov 13 1:50 PM '42

* * * * *

1. The name and address of appellant is Georgiana Hamilton, 229 C Street, S. W.
2. The name and address of the appellant's attorney is C. D. Artis, 512 Fifth Street, N. W.

3. The offense charged was Soliciting Prostitution and Possession of Number Slips.

4. The judgment was entered on November 7, 1942.

5. The judgment was ninety days on Soliciting Prostitution and ninety days on Possession of Number Slips.

6. The defendant is now at liberty having posted a five hundred dollar bond in each case.

The above named appellant hereby appeals to The Municipal Court of Appeals for the District of Columbia from the judgment or order above mentioned.

C. D. ARTIS

Attorney for Appellant

Service of copy of the above Notice of Appeal is hereby acknowledged.

(signed) J. P. BURKE Nov. 13, 1942

Assistant District Attorney

• • • • •

8

Statement of Errors Claimed

Filed Nov 18 3:44 PM '42

• • • • •

1. The Court erred in finding the defendant guilty because Judgment was contrary to the weight of the evidence.

2. The Court erred in finding the defendant guilty because the Judgment was contrary to law.

3. The Court erred in finding the defendant guilty because his findings were influenced by the long criminal record of the defendant which was evidenced by the statement, of the Court, immediately prior to sentence, "Georgiana, you have been 'getting away' a long time but I am going to put you out of circulation for a while."

4. The Court erred in not granting defendant Motion for a New Trial.

C. D. ARTIS

Attorney for defendant

I, C. D. Artis, attorney for the defendant do hereby certify that I served a copy of the foregoing Statement of Errors Claimed on the United States District Attorney by mailing a copy of the same addressed to him this 18th day of November, 1942.

C. D. ARTIS

• • • • •

9 *Statement of Proceedings and Evidence*

Filed Dec. 10, 1942

• • • • •

Be it remembered that upon the trial of these cases consolidated, 7th day of November, 1942, before the Honorable Judge John P. McMahon in the United States Branch of the Municipal Court of the District of Columbia, to maintain the issue on its part jointed, the United States produced the following evidence and the following proceedings were had:

That on the 7th day of November, 1942, two informations were filed against the defendant Georgiana Hamilton, by the United States, being filed by John B. Diamond, Assistant United States Attorney in and for the District of Columbia, and being prosecuted in the name of Edward M. Curran, Attorney for the United States in and for the District of Columbia. One information charged that the defendant with force and arms, and on the 200 block of C Street, Southwest, did then and there unlawfully invite, entice, and persuade and address for the purpose of inviting, enticing, and persuading an adult person, to wit, J. R. Allen, to accompany her, go with her, follow her for the purpose of prostitution or for some other lewd or immoral purpose; the other, charged that the defendant did then and there unlawfully, have in her possession, knowingly, a certain ticket, certificate, bill, slip, token, paper, writing, and other device used and to be used, adopted, devised,

10 and designed for the purpose of playing, carrying on, and conducting a lottery and the game or device commonly known as policy lottery or policy.

The defendant on November 7, 1942, entered a plea of "Not Guilty" to both charges; she was tried and sentenced to serve 90 days on each charge, to which an appeal was noted.

At the trial, Officer J. R. Allen, Metropolitan Police Force, testified that at about 11:30 P.M. on the night of November 6, 1942, he was walking in the 200 block of C Street, Southwest, when the defendant called to him and said, "You had better go on down street, because the girls down here all know that you are a policeman"; and he replied, "Are you kidding, I'm no policeman"; that defendant then said "How much do you want to spend for a good ——— (using a word which it is agreed imported sexual intercourse); that the officer said he would be willing to spend \$2.00 and asked the defendant, "Where do we go from here, we can't do it in the street"; that defendant said "In my house", and started to turn into the yard at 229 C Street, Southwest, where she was placed under arrest by the witness. That a police cruiser, driven by Sergeant Howe, in company with Officer Eastman, was driving past and witness hailed them and put the defendant into the car and took her to No. 4 Police Station where he searched her pocketbook and found a book of lottery or number slips.

Upon cross-examination Officer Allen testified that he searched the pocketbook of the defendant at No. 4 Precinct and took out an Hawaiian dollar bill; he further testified that two officers had put him out of a car down street before he met the defendant but they were not witnesses
11 in the case; that he had information that she peddled "dope", (a narcotic drug). He denied that he had her searched at the Women's Bureau for narcotics or that he had requested a physician to examine her to determine if she used drugs.

The defendant, being called a as witness in her own be-

half, testified that she was waiting for a taxi when three officers, Blick, Allen, and one that she knew by the name of "Smiley", drove up; that one of the officers called her to the car; that she walked to the car knowing them all and knowing that they knew her; that Officer Allen took hold of her and pushed her into the car; that he took her pocket-book and searched it and asked her where the "dope" was; that he searched her at the precinct and notified them Women's Bureau; that he took an Hawaiian dollar bill out of her purse; that the same was a souvenir sent to her by a soldier; that one of the officers at the precinct said, "What are you going to charge her with?", and Officer Allen said, "Put soliciting against her, she has a long record, it will stick"; that they took a book containing lottery or number slips out of her purse; that at the Women's Bureau she was searched and examined by a physician to see if she was a user of "dope". That after argument of Counsel the Court stated that he was satisfied beyond a reasonable doubt from the evidence that the defendant had solicited Officer Allen for the purpose of prostitution and adjudged her to be guilty.

Thereupon a purported record of the defendant was handed to the Court and the defendant was asked if she was the same Georgiana Hamilton who had been convicted of soliciting prostitution in the District of Columbia:

12	2-23-31	Soliciting Prostitution	\$25.00 Fine
	8-24-33	" "	\$25.00 Fine
	3-21-34	" "	\$25.00 Fine
	11- 7-36	" "	\$100.00 or 45 days
	9- 5-39	" "	90 days
	4-10-40	" "	90 days

The defendant answered that she was the same person who had been convicted of the above mentioned offenses. The Court thereupon said "Georgiana you have a long record of conviction for offenses of this kind and I am going to put you out of circulation for a while". The Court

thereupon sentenced the defendant to serve a term of 90 days in each of the two cases.

That on November 12, 1942, defendant filed a Motion for a New Trial with supporting affidavits. The Motion for a New Trial was overruled on November 18, 1942.

And the Court hereby certifies that the foregoing is a substance of the proceedings and evidence had in this case.

The defendant, Georgiana Hamilton, now tenders this, her statement of proceedings and evidence, and prays that the same be signed, sealed, enrolled and made a part of the record in this cause, this 10th day of December, A. D., 1942, which is accordingly done.

(signed) JOHN P. McMAHON
Judge.

* * * * *

16

Monday, February 8, 1943.

The Court met pursuant to adjournment. Present: The Honorable William E. Richardson, Chief Judge, Nathan Cayton and Andrew M. Hood, Associate Judges.

Proclamation being made the Court is opened.

* * * * *

The argument in the above entitled case was commenced by Mr. C. D. Artis, attorney for appellant, continued by Mr. John P. Burke, attorney for appellee and was concluded by Mr. C. D. Artis, attorney for appellant.

* * * * *

17

Monday, March 1, 1943

The Court met pursuant to adjournment. Present: The Honorable William E. Richardson, Chief Judge, Nathan Cayton and Andrew M. Hood, Associate Judges.

Proclamation being made the Court is opened.

* * * * *

It appearing from the record herein that a motion for new trial in the above case was filed November 11, 1942, and that on November 18, 1942, said motion was overruled, a notice of appeal meanwhile having been filed, and it not appearing from the record whether said motion for new trial was heard upon its merits or was denied because of the appeal, it is ORDERED that a supplemental record be certified by the trial judge and returned to this court showing whether (a) the motion was denied on the merits or (b) denied for the reason that the appeal had been noted in the meantime.

WM. E. RICHARDSON,
Chief Judge

March 1, 1943.

* * * * *

19

Certificate of Trial Judge

Filed Apr 8 3:33 PM—1943

In pursuance to the order heretofore passed in the above-entitled cause, requesting that a supplemental record be certified by the trial judge showing whether (a) the motion for a new trial was denied on the merits or (b) denied for the reason that the appeal had been noted in the meantime, I hereby certify as follows:

The principal ground of the motion for a new trial was:

“3. That the defendant has discovered new evidence that was not available to her at the time of trial; that the affidavits of two witnesses are hereto attached and prayed to be made and read as a part hereof.”

In support of this ground of the motion three affidavits were filed, that of the defendant as well as those of one Marie Belt and one Thelma Matthews.

In her own affidavit, the defendant alleged that she did not produce the witness Marie Belt at the trial because

defendant thought Marie Belt had gone to the hospital to give birth to a baby; that Marie Belt had told defendant the night before, just before defendant was arrested, that she was going to the hospital.

I, as trial judge, ruled that the affidavit of said Marie Belt could not be considered as a ground for a motion for a new trial on the ground of newly discovered evidence because it was not newly discovered since the
20 trial, that the evidence was known to the defendant at the time of trial because in her affidavit defendant alleged she saw and talked to Marie Belt just before her arrest and knew Marie Belt was present at the time of the arrest; that defendant could have attempted to procure the presence of such witness by filing a motion for a continuance on the ground of an absent witness but that no such motion had been filed.

To this ruling the attorney for the defendant not only did not except but stated he considered the ruling correct and requested the court to consider the affidavit of said Thelma Matthews.

Upon the consideration of the affidavit of said Thelma Matthews I, as trial judge, ruled that the statements therein contained did not constitute grounds for a motion for a new trial because of alleged newly discovered evidence, for the following reasons: That the testimony of the arresting officer was that he had been solicited by the defendant and had placed her under arrest; that at the time of the arrest a police cruiser was driving past and witness hailed it and put the defendant into the car and took her to No. 4 police station; that the affidavit of Thelma Matthews did not aver where she was at the time; did not deny or contradict the testimony of the officer that he had been solicited by the defendant; that it simply averred that she saw one officer grab the pocketbook of the defendant and push her into the car. I ruled that the car into which Thelma Matthews swears she saw the defendant pushed could have been the police cruiser testified to by the arresting officer, and that

the officer whom Thelma Matthews swears pushed the defendant into the car could have been the arresting officer pushing the defendant into the police cruiser after
 21 he had been solicited and after he had arrested the defendant. I stated that in my opinion the evidence of Thelma Matthews, as set forth in the affidavit, was not such as ought to produce a different result on the merits on another trial.

The motion for a new trial was filed November 11, 1942. Notice of Appeal was filed November 13, 1942. The motion for a new trial came on for hearing on November 18, 1942. When the motion was presented I commented that I did not know what, if any, effect upon the jurisdiction of the court the Notice of Appeal would have, but that I would hear the motion on its merits.

Wherefore, I hereby certify that the motion for a new trial was denied on the merits and not for the reason that the appeal had been noted in the meantime.

(signed) JOHN P. McMAHON

Trial Judge.

23

Opinion

* * * * *

RICHARDSON, *Chief Judge*: On November 6, 1942, appellant was arrested on the street in front of her home. The next morning she was tried on informations charging solicitation and possession of lottery slips.

The officer who made the arrest testified that after a brief colloquy on the sidewalk she had invited him into her house for the purpose of sexual intercourse; that he walked with her to the entrance to the yard in front of her house where he placed her under arrest. He stated that he then hailed a passing police car and carried her to the station. There a book containing lottery or "numbers" slips was taken from her purse.

Appellant denied the officer's version of her arrest and

specifically denied the alleged solicitation. The trial
 24 court found her guilty on both charges, and since the
 questions involved were wholly factual, and there
 was substantial evidence on which to base the findings,
 we have no grounds for reversal.

November 11, 1942, appellant seasonably filed a motion
 for new trial, accompanied by affidavits of two persons,
 one known to appellant at the time to have witnessed her
 arrest; the other discovered subsequent to the trial.

The motion for a new trial was denied November 18,
 1942. Meanwhile, on November 13, 1942, appellant had
 filed her notice of appeal.

At the hearing of the appeal a suggestion was made by
 counsel that the denial of the motion for new trial was
 without consideration of its merits because of the filing of
 the appeal before the motion was argued and submitted.
 We therefore directed the trial court to file a supplemental
 record showing the grounds for its denial of the motion.¹
 This supplemental record was filed and discloses that the
 court rejected the affidavit of one witness because her pres-
 ence at the time of the arrest was known to appellant prior
 to the trial, and decided that the statements of the affidavit
 of the second witness, if true, were not sufficient to cause a
 reversal of its finding if a new trial were granted.

The granting or denial of a motion for new trial is not
 ordinarily reviewable on appeal,² and this is true of a motion
 based upon newly discovered evidence unless it is found
 that the denial was a manifest abuse of discretion.³

Here the trial court had heard the testimony at the trial
 and was in a position to evaluate, as we cannot, the proposed

¹ See *Thomas v. United States*, 74 App. D. C. 167, 121 F. 2d 905, where
 Juvenile Court was directed to rehear motion for new trial and file supple-
 mental record.

² *Concrete Oil Tank Co. v. Meneffee*, 61 App. D. C. 63, 57 F. 2d 429;
Leapley v. Matthews, 60 App. D. C. 251, 50 F. 2d 1016; *Whelan v. Welch*,
 50 App. D. C. 173, 269 F. 689; *Hill v. United States*, 22 App. D. C. 395
 (412).

³ *Thomas v. United States*, note 1 *supra*; *District National Bank v.*
Maiatico, 61 App. D. C. 242, 60 F. 2d 1078.

new evidence. Appellant had during a period of nine years ending in 1940 received six sentences for soliciting prostitution; had paid a total of \$175 in fines, and served two ninety day terms. This does not in any degree forfeit her right to the full and equal protection of the law, but it does affect the credibility of her testimony. Assuming that the additional witness whose existence was known
 25 to appellant could not be produced at the trial, a continuance should have been requested. The trial court properly refused to consider her affidavit in support of the motion for new trial. And we do not find that the ruling of the trial court as to the probative effect of the affidavit of the newly discovered witness was plainly wrong or was an abuse of discretion.

While there is considerable divergence of opinion in defining "abuse of discretion", courts agree that "difference in judicial opinion" is not synonymous with "abuse of judicial discretion".⁴

As to the conviction on the charge of possessing numbers slips, the affidavits did not attempt to establish innocence but to render inadmissible the evidence on which the conviction was based. The record does not disclose that this evidence was objected to when it was offered; it was not mentioned in the motion of new trial, and apparently this point is raised for the first time on this appeal.

Although we have considered the record to determine whether reversible error exists, it is our opinion that the appeal should be dismissed and not affirmed for the reason that it was taken during the pendency of the motion for new trial, at a time when the judgment lacked "that finality which is essential to appealability." *Leishman v. Associated Wholesale Electric Co.*, — U. S. —, 63 S. Ct. 543, decided February 15, 1943.

The Act creating this court⁵ limited its jurisdiction to

⁴ *Belock v. State Mutual Fire Ins. Co.* 166 Vt. 435, 175 A. 19; *Cooper v. Carr*, 161 Mich. 405, 126 N. W. 468.

⁵ Public Law 512—77th Congress.

appeals from "any final order or judgment". Our Rule 27 (d) provides that when a motion for a new trial has been seasonably filed the time for filing a notice of appeal "shall not begin to run until disposition of such motion". The adoption of this rule was unnecessary. It was merely a declaration of the general law, serving as a convenient notice to litigants.

Under statutes containing similar provisions it has been repeatedly decided by the Supreme Court of the United States that a judgment is not "final" and is not appealable while a motion for new trial, seasonably filed, remains undecided.⁶ This has been the law of this jurisdiction for many years.

26 In the early case of *Vincent v. Vincent*, 3 Mackey 320, under circumstances similar to the present, the court dismissed the appeal.

This case was cited and the rule applied in *Southland Industries v. Federal Communications Commission*, 69 App. D. C. 82, 99 F. 2d 117, where the subject was fully considered and many decisions reviewed. There the court rejected the further contention of the appellant that the appeal might be regarded as dormant and take effect upon the final decision of the application for rehearing.⁷

In this respect our practice is similar to that of the Federal Courts and those of other jurisdictions where the common law has not been changed by statute.⁸

The Act of April 1, 1942, *supra*, provides that our rules shall conform as nearly as practical to the Federal Rules of Civil Procedure. This direction was followed in the adoption of our Rule 17, whereby our jurisdiction attaches upon the filing of the notice of appeal. This cannot result if there is then no appealable judgment or order.

Dismissed.

⁶ *Northern Pac. R. Co. v. Holmes*, 155 U. S. 137; *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675; *United States v. Ellicott*, 223 U. S. 524.

⁷ See also *Woodmen of the World Life Ins. Ass'n. v. Federal Communications Commission*, 69 App. D. C. 87, 99 F. 2d 122.

⁸ *Clark v. Eureka Co. Bank*, C. C. Nev., 131 F. 145; *Durrence v. Waters*, 140 Ga. 762, 79 S. E. 841; *Duke v. Story*, 113 Ga. 112, 38 S. E. 337; *Colchin v. Ninde*, 120 Ind. 88, 22 N. E. 94.

CAYTON, *Associate Judge*, dissenting: I am unable to agree with the views of my colleagues. I think the appeal should not be dismissed but should be considered on the merits and a reversal ordered.

1. Notice of appeal was timely, having been filed within five days from the judgment of conviction. Appellant should not be penalized for having filed it before the motion for new trial had been acted upon. Had a new trial been granted appellant could have withdrawn the notice of appeal. Congress re-established the right of appeal in these cases when it created this court a year ago, and we should not destroy that right by technical restrictions.

2. The conviction should be reversed because of the refusal to grant a new trial. It seems clear that the
27 officer was seeking to establish a narcotics charge against the defendant. He said he had information that she was a peddler of narcotics" and the uncontradicted evidence is that while in custody she was examined by a physician to determine whether she was a user of narcotics. The government's showing on the charge of soliciting prostitution was dubious at best, and rather plainly indicated that the charge of soliciting was placed against the defendant when no evidence for the narcotics charge could be found. The arresting officer himself testified at the very outset of the trial that the defendant told him, "You had better go on down the street because the girls down here all know that you are a policeman"; that he replied, "Are you kidding? I'm no policeman"; that defendant then made the unlawful proposal, and that after a brief discussion as to terms, and as they were starting to turn into the yard of her home he placed her under arrest; that a police cruiser containing two other officers "was driving past and witness hailed them and put the defendant into the car and took her to No. 4 police station where he searched her pocket book and found a book of lottery or number slips."

Defendant's testimony was that three officers, Blick, Allen,

and one "Smiley" drove up as she was waiting for a taxi in front of her home; that one of the officers called her to the car and Officer Allen took hold of her and pushed her into the car; that he took her pocket book and searched it and asked her where the dope was. She testified further that at the precinct one of the officers asked, "What are you going to charge her with?" and Officer Allen said, "Put soliciting against her, she has a long record, it will stick." Of this there is no contradiction in the record.

Obviously if defendant's version of the incident was correct she could not have been engaged with soliciting for she had no conversation with the officers but was swiftly pushed into the squad car, searched and arrested. To me it seems significant that neither of the officers in the squad car was called to give testimony. Presumably they could have shed considerable light on what transpired immediately before the arrest and whether Officer Allen had left the squad car or had had any talk, or time or opportunity to talk, with defendant before the arrest.

After conviction defendant filed a motion for new trial, supported by her own affidavit and those of two witnesses.

One was Marie Belt, who made her affidavit while
28 in the hospital, as follows:

"I am in the Hospital and that I told the defendant, Georgiana Hamilton, Friday night that I was expecting to go to the Hospital to give birth to a baby; that I had talked with her just before a car drove up and called Georgiana to it; that I saw one of the men snatch her pocket book, look in it, push her in the car, and drive away; that I am a married woman, the mother of four children, with no police record."

The second affidavit was that of Thelma Matthews who swore:

"I saw Georgiana Hamilton when she was called to a car occupied by certain police officers on Friday night, November 6, 1942; that I saw one of them grab

her pocket book and push her into the car; that Georgiana did not know that I saw what happened until she was released on bond, Monday, November 9, 1942."

In her own affidavit defendant swore that she had not produced Marie Belt at the trial because she thought she had gone to the hospital to give birth to a baby as she had told her the night before, just before the officers arrested her; that she did not know that the witness Thelma Matthews had seen the incident and did not discover it until after she had been released on bail.

It must be remembered that defendant was arrested on Friday evening, tried and convicted the following morning and not released on bail until the following Monday. I am satisfied that the evidence of the two witnesses mentioned was "newly discovered" under the decided cases, and that fairly considered, the testimony, if received, would have been likely to require an acquittal. I cannot agree with the statement in the majority opinion that we are not in a position to "evaluate" the proposed new evidence. This is relinquishing, without reason, one of our plain functions as a reviewing court. The two witnesses were never summoned into court for examination or cross-examination.

29 The trial judge neither saw nor heard them and made his "evaluation" of the proposed testimony solely from the affidavits. Those affidavits are before us and appellant is entitled to have us review them. If at the trial defendant had been corroborated by those two witnesses is it likely that the trial judge would have rejected such persuasive testimony, establishing as it did that there was neither time nor opportunity for solicitation?

Looking at the picture as presented I am satisfied that the refusal to grant a new trial constituted an abuse of discretion. This term is not so harsh as it may seem. To find abuse of discretion we need not find that there was an improper motive, wilful purpose, prejudice, partiality or intentional wrong on the part of the trial judge.¹ We need only

¹ *Pettegrew v. Pettegrew*, 128 Neb. 783, 260 N. W. 287.

find, as I think we should find here, that the exercise of discretion is subject to review "where the error in its exercise is plainly shown and works material hardship and injustice."² The judicial discretion should be exercised "in a manner to subserve and not to impede or defeat the ends of substantial justice."³ I do not suggest that we should set up our own judgment against that of trial judges in purely discretionary matters, but when the precise ground on which the motion is based is clearly stated and the legal effect of such a ruling is not left in doubt it should be reviewed with the same freedom as rulings upon any other question of law.⁴ For obvious reasons an appellate court should more closely study a ruling *refusing* a new trial than one *granting* new trial.⁵ The cases cited dealt with civil disputes and I regard them as applying even more strongly where liberty is involved.

Certainly neither the nature of the charge nor the prior record of defendant should be permitted to affect her right to a full, fair and impartial trial. When that result has not been achieved, a trial judge should grant a new trial. When it is refused, we should not hesitate to correct the error.

30

Tuesday, May 11, 1943.

The Court met pursuant to adjournment. Present: The Honorable William E. Richardson, Chief Judge, Nathan Cayton and Andrew M. Hood, Associate Judges.

* * * * *

Appeal from the Municipal Court for the District of Columbia. JUDGMENT This cause came on to be heard

² *In re Mattulath*, 38 App. D. C. 497.

³ *Nicholls v. Anders*, 13 Cal. App. 2d 440, 56 P. 2d 1289.

⁴ *Mullong v. Mullong*, 178 Iowa 552, 159 N. W. 994.

⁵ *Ibid.* Supporting my general views, above expressed, are *Horse Importing Co. v. Novak et al.*, 105 Iowa 157, 74 N. W. 759; *Turley v Griffin*, 106 Iowa 161, 76 N. W. 600; *Stockwell v. C. C. & D. R. Co.*, 43 Iowa 470; *Riley v. Monohan*, 26 Iowa 507; *Nelson v. Telegraph Co.*, 162 Iowa 50, 143 N. W. 833; *Busse v. Schaeffer*, 128 Iowa 319, 103 N. W. 947; *Merchant v. O'Rourke*, 111 Iowa 351, 82 N. W. 759.

on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that this appeal be, and it is hereby, dismissed.

WILLIAM E. RICHARDSON,
Chief Judge

May 11, 1943.

Dissenting opinion by Nathan Cayton, Associate Judge.

* * * * *

32 *Objection to Certificate of Trial Judge*

Filed Aug 2 1943

* * * * *

The appellant in the above entitled case objects of the Certificate of the Trial Judge for the following reasons, to wit:

1. The attorney for the appellant contends that the Motion for a New Trial was not denied on its merits because the following conversation was had:

Trial Judge—"Mr. Artis, you admit that if I hear the motion I can grant it or deny it?"

Attorney—"I do, Your Honor."

Trial Judge—"And if I deny the motion and send her to jail (The defendant was out on bond at the hearing of the motion) you will say, 'Oh, no, you can not send her to jail she is on an appeal bond.' "

Attorney—"That is probably correct."

2. After the above conversation was had, the attorney was given 3 days, more or less, to produce some law to the effect that the Trial Judge had a right to grant a New Trial, when the defendant was at liberty on an appeal bond, otherwise, the Motion for a New Trial would be denied.

Later, the attorney was called in and asked if he had found any law to the effect that the Trial Judge had a right

to hear a Motion for a New Trial when the defendant was on an appeal bond. He said, "no" and the motion for a New Trial was marked "denied" or words to that effect.

I hereby certify that the above reasons for the Objection to Certificate of Trial Judge are true to the best of my belief:

C. D. ARTIS

Attorney for Appellant

Copy of Certificate of Trial Judge received April 12, 1943.

• • • • •

RECOGNIZANCE

In the Police Court of the District of Columbia

This 9 day of Nov. A.D. 1942ON PETITION FOR ALLOWANCE OF AN APPEAL TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.The District of Columbia
The United States

vs.

Georgiana Hamilton

The defendant and

Jan. Stewart

surety

acknowledge themselves to be indebted to the UNITED STATES - DISTRICT OF COLUMBIA, in the sum of Five-Hundred dollars, lawful money of the United States, to be levied on their and each of their goods and chattels, land and tenements, upon condition, nevertheless, that whereas the said defendant was on the 7 day of Nov. 1942, convicted in the Police Court of the District of Columbia of

Pos. # 1 bps

and it was thereupon adjudged by said Court that said defendant pay a fine of _____ dollars, and, in default to be committed to a Jail-type institution for the term of _____

Twenty

days;

and whereas the said defendant has taken exceptions to the rulings of the Court upon matters of law in said trial and having given notice in open court of his intention to apply for an allowance of an appeal to a Justice of the U. S. Court of Appeals for the District of Columbia: Now, therefore, if said defendant shall, in the event of a denial of his application for said allowance of an appeal within five days next after the expiration of ten days from the date hereof, appear in the Police Court and abide by and perform its judgments in the premises, and in the event of the allowing of such appeal, he shall appear in the U. S. Court of Appeals for the District of Columbia and prosecute said appeal and abide by and perform its judgments in the premises, then this recognizance to be void and of no force.

Acknowledged in open Court before me.

Georgiana Hamilton
Jan. StewartW.F. Bramhall Clerk.By P. G. Matthews
Deputy Clerk, Police Court, D.C.

679

No. 423316
Municipal Court for
Police Court
DISTRICT OF COLUMBIA

RECOGNIZANCE TO ANSWER IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA

Gregory Hamilton
1943
1940
John Stewart
Surety.

Taken the 9 day of Nov 1943
O. G. Matthews
Deputy Clerk, Police Court, D.C.
Municipal

Municipal Court for
IN THE POLICE COURT OF THE DISTRICT OF COLUMBIA
9 day of Nov A. D. 1943
John Stewart
duly sworn, doth declare and say that he has not mortgaged, sold or
otherwise disposed of any of his real-estate as itemized in the sworn
statement filed by him with the Clerk of the Police Court on the 7th day of
Jan 1940; that the sworn statement made
by him on the aforesaid date is, in all details, the same now as then;
other than that as indicated by a sworn statement subsequently filed
by him with the Clerk of the Police Court on the 11 day of
Jan 1943; that the amount of this bond does not
bring the total amount of his existing bonds in the Police Court in ex-
cess in the aggregate to more than twice the assessed value of the
unencumbered real estate listed in said sworn statement.
John Stewart
Subscribed and sworn to before me, this 9 day of Nov 1943

J. G. Bramhall
Deputy Clerk, Police Court, D.C.
Municipal

RECOGNIZANCE

In the Police Court of the District of Columbia

This 9 day of Nov. A.D. 1942

ON PETITION FOR ALLOWANCE OF AN APPEAL TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.

**The District of Columbia
The United States
vs.**

Georgiana Hamilton

The defendant and J.W. Stewart surety

acknowledge themselves to be indebted to the UNITED STATES - DISTRICT OF COLUMBIA, in the sum of Five Hundred dollars, lawful money of the United States, to be levied on their and each of their goods and chattels, land and tenements.

upon condition, nevertheless, that whereas the said defendant was on the 7 day of July, 1942, convicted in the Police Court of the District of Columbia of

Soliciting Prostitution
and it was thereupon adjudged by said Court that said defendant pay a fine of _____

and, in default to be committed to a Jail-type institution for the term of _____ dollars.

and whereas the said defendant has taken exceptions to the rulings of the Court upon matters of law in said trial and having given notice in open court of his intention to apply for an allowance of an appeal to a Justice of the U. S. Court of Appeals for the District of Columbia: Now, therefore, if said defendant shall, in the event of a denial of his application for said allowance of an appeal within five days next after the expiration of ten days from the date hereof, appear in the Police Court and abide by and perform its judgments in the premises, and in the event of the allowing of such appeal, he shall appear in the U. S. Court of Appeals for the District of Columbia and prosecute said appeal and abide by and perform its judgments in the premises, then this recognizance to be void and of no force.

"Acknowledged" in open Court before me.

Georgia Hamilton
for Walter Stewart

W. F. Bramhall Clerk.

By P. A. Mathias, Jr.
Deputy Clerk, Police Court, D.C.
municipal

087

No. 425317

Municipal Court For the
DISTRICT OF COLUMBIA
Criminal Dep.

RECOGNIZANCE TO ANSWER IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA

Virginia Hamilton

560

J.W. Stewart
Surety.

Taken the 9 day of Nov. 1942

A. G. McWilliams
Deputy Clerk, Potter Court, D.C.
municipal

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
IN RECOGNIZANCE TO ANSWER IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

9 day of Nov. 1942 A. D. 1942

J.W. Stewart

surety in the within recognizance, being
duly sworn, doth declare and say that he has not mortgaged, sold or
otherwise disposed of any of his real-estate as itemized in the sworn
statement filed by him with the Clerk of the ~~Potter~~ Municipal Court on the 24th
day of Jan. 1942; that the sworn statement made
by him on the aforesaid date is, in all details, the same now as then;
other than that as indicated by a sworn statement subsequently filed
by him with the Clerk of the ~~Potter~~ Municipal Court on the day of
1942; that the amount of this bond does not
bring the total amount of his existing bonds in the ~~Potter~~ Municipal Court in ex-
cess in the aggregate to more than twice the assessed value of the
unencumbered real estate listed in said sworn statement.

G. Walter Stewart

Subscribed and sworn to before me, this day of 1942

W. F. Bramhall, CLERK.
A. G. McWilliams

Deputy Clerk, Potter Court, D.C.
Municipal

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED NOV 17 1943
Joseph M. Stinson

No. 8534

United States Court of Appeals

DISTRICT OF COLUMBIA

OCTOBER TERM, 1943

GEORGIANA HAMILTON, APPELLANT

v.

UNITED STATES OF AMERICA, ~~APPELLANT~~ APPELLEE

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

EDWARD M. CURRAN,
United States Attorney.

RAY L. JENKINS,
CHARLES B. MURRAY,
JOHN P. BURKE,
Assistant U. S. Attorneys.

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GEORGIANA HAMILTON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

COUNTERSTATEMENT

Appellant's statement of the case narrates the proceedings only through judgment and a further statement is necessary to show what occurred thereafter in the trial court and in the Municipal Court of Appeals.

In connection with her motion for a new trial on the ground of newly discovered evidence filed on November 11, 1942 the appellant filed two affidavits, on November 12th, of witnesses. The first affidavit, that of Marie Belt, reads as follows:

I, Marie Belt, being first duly sworn according to law, depose and say that I am in the Hospital and that I told the defendant, Georgiana Hamilton, Friday night that I was expecting to go to the Hospital to give birth to a baby; that I had talked with her just before a car drove up and called Georgiana to it; that I saw one of the men snatch her pocket book, look in it, push her in the car, and drive away; that I am a married woman, the mother of four children, with no police record.

The other affidavit, that of Thelma Matthews reads as follows:

I, Thelma Matthews, being first duly sworn according to law, depose and say that I saw Georgiana Hamilton when she was called to a car occupied by certain

police officers on Friday night, November 6, 1942; that I saw one of them grab her pocket book and push her into the car; that Georgiana did not know that I saw what happened until she was released on bond, Monday, November 9, 1942.

The next day, November 13th, appellant filed her notice of appeal (App. p. 8). The motion for a new trial was argued on November 18th (App. p. 16), and overruled on that day. The dates set forth by appellant in her statement (Brief p. 4) for these various proceedings do not correspond to those entered by the clerk (App. p. 5) and the statement of the trial Judge in his supplemental record (App. p. 16).

When the case came on to be heard in the Municipal Court of Appeals, appellant then and for the first time made the contention that the trial judge had denied the motion for a new trial, not on the merits, but rather for the reason that notice of appeal having been filed in the case, he was without jurisdiction to decide the motion. That this contention was first made at the argument of the appeal appears by the opinion of the Municipal Court of Appeals (App. p. 17). Furthermore, appellant had not prepared a record which showed whether or not this was so. Accordingly, the Court of Appeals had to supplement the deficiency in the record, which it did by an order to the trial court that that court certify a supplemental record showing "whether (a) the motion was denied on the merits, or (b) denied for the reason that the appeal had been noted in the meantime" (App. p. 14). Not only were counsel for both sides advised at the time of oral argument that the Court would take such action to supplement the record, but counsel were advised by mail in the usual manner of the order of the Court referred to above.

The trial Court in obedience to the order of the Municipal Court of Appeals prepared a certificate wherein the trial judge informed the Court of Appeals of the reason for a denial of the motion for a new trial. This certificate (App. pp. 14-16) showed that the trial judge denied the motion on the merits and for the reason that the affidavit of Marie Belt did not show newly discovered evidence and the affidavit of Thelma Mat-

thews did not make an offer of evidence which would necessarily change the result. Appellant did not attempt to participate in the preparation of this supplemental record. Said certificate of the trial judge having been filed in the Municipal Court of Appeals on April 8th, then and only then did appellant attempt to controvert that certificate by filing in the Municipal Court of Appeals a paper entitled "Objection to Certificate of Trial Judge." By this paper appellant purported to "certify" to the Municipal Court of Appeals that the motion was denied not on the merits but because appellant was at liberty on an appeal bond. Thereafter, the Municipal Court of Appeals affirmed the decision of the trial Court.

STATEMENT OF ISSUES

I

Does a notice of appeal from a conviction in the criminal division of the Municipal Court, filed while a timely motion for a new trial is still pending and undecided, confer jurisdiction on the Municipal Court of Appeals to entertain an appeal.

II

Did the trial court commit an abuse of discretion in denying the motion for a new trial.

(a) Is it an abuse of discretion or plainly wrong for the Municipal Court, Criminal Division, to deny a new trial on the ground of newly discovered evidence where the alleged new evidence was that of a witness whose name and testimony was known to defendant at the time of trial, and no request was made of the court for a continuance and no effort was made to subpoena the witness.

(b) Is it an abuse of discretion or plainly wrong for that court to deny a new trial on the ground of newly discovered evidence where in the opinion of the trial court, the proffered evidence is not inconsistent with the evidence in the case, and did not necessarily require a different result than that reached.

III

Is it within the power of the Municipal Court of Appeals to require the trial court to certify a supplemental record?

IV

Are the judgments of conviction of soliciting prostitution and of possession of numbers slips rendered herein plainly wrong or without evidence to support them?

SUMMARY OF ARGUMENT

I

There is no final judgment of conviction in the Municipal Court as long as a timely motion for a new trial remains pending and undecided and there is, therefore no appealable order or judgment. The time for taking an appeal from a judgment of conviction is suspended by the timely filing of a motion for a new trial and the time for such an appeal does not begin to run until such a motion has been decided. Notice of appeal filed prior to such time confers no jurisdiction on the appellate court.

II

(a) Evidence is not newly discovered which is known to a defendant at the time of trial. In the absence of an attempt by that defendant to subpoena the witness or of a request for a continuance to permit the production of the witness, it is not an abuse of discretion or plainly wrong for a trial court to deny a new trial, and the trial court properly refused to consider the affidavit of Marie Belt.

(b) Where a trial court has heard the evidence in the case it has a superior opportunity to judge of the materiality and probable effect of an offer of additional evidence. To warrant a new trial such additional evidence, although newly discovered, must be such that it would require a different result at another trial. The ruling of the trial court will not be considered erroneous unless the only possible view is that such evidence would require a different result. In this case, the affidavit of Thelma Matthews is not necessarily inconsistent with the evidence heard at the trial itself.

III

The Municipal Court of Appeals has the power to supplement omissions in the record by directing the trial court to certify a supplemental record.

IV

(a) The judgment of conviction of soliciting prostitution rendered herein is not plainly wrong nor without evidence to support it.

(b) The conviction of possession of numbers slips is uncontradicted.

ARGUMENT

I

A notice of appeal in a criminal case filed after judgment but before the ruling on a timely motion for a new trial does not confer jurisdiction on an appellate court.

This issue ought to be first considered because if the Municipal Court of Appeals' ruling was correct and is affirmed, the other issues in the case need not be considered. That the Municipal Court of Appeals was correct in its ruling will be shortly demonstrated.

The judgment herein was rendered on November 7th. A motion for a new trial was filed on November 11th. Notice of appeal was filed on November 13th. The motion for a new trial was overruled on November 18th (App. p. 5). Notwithstanding that the notice of appeal was filed five days before the motion for a new trial was overruled, the statement of errors filed on November 18th included an assignment of error in overruling the motion for a new trial (App. p. 9).

The Municipal Court of Appeals ruled:

that the appeal should be dismissed and not affirmed for the reason that it was taken during the pendency of the motion for new trial, at a time when the judgment lacked "that finality which is essential to appealability." (*Leishman v. Associated Wholesale Electric Co.*, — U. S. —, 63 S. Ct. 543, decided February 15, 1943.)

The Act creating this court limited its jurisdiction to appeals from "any final order or judgment." Our Rule 27 (d) provides that when a motion for a new trial has been seasonably filed the time for filing a notice of appeal "shall not begin to run until disposition of such motion." The adoption of this rule was unnecessary.

It was merely a declaration of the general law, serving as a convenient notice to litigants.

Under statutes containing similar provisions it has been repeatedly decided by the Supreme Court of the United States that a judgment is not "final" and is not appealable while a motion for new trial, seasonably filed, remains undecided. This has been the law of this jurisdiction for many years.

This Court has recently reaffirmed the rule that the time limited for taking an appeal does not begin to run until the disposition of the pending motions for rehearing or for a new trial. *Burke v. Canfield*, 72 App. D. C. 127, 111 F. (2d) 526 (1940). The following cases show that not only does the time for taking an appeal not run while a motion for a new trial is pending, but that during that time the trial court has jurisdiction of the case, and its judgment cannot be appealed until the motion for a new trial has been decided. *Kingman v. Eastern Manufacturing Co.*, 170 U. S. 675, 678 (1898):

The motion for new trial in this case was filed * * * seasonably * * *. No leave to file it was required and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was legally and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in form and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then, the judgment or decree does not take final effect for the purpose of the writ of error or appeal.

See also *Southland Industries v. Federal Communications Commission*, 69 App. D. C. 82, 85, 99 F. (2d) 117, 120 (1938):

"Two courts cannot have jurisdiction in the same case at the same time."

Doyle v. District of Columbia, 45 App. D. C. 90, 91 (1916): "The motions to vacate the judgment were timely, and, until they are disposed of by order of the court, the time for the perfecting of the appeals remained suspended." *Vincent v.*

Vincent, 3 Mackey (14 D. C.) 320, 322 (1884): "We are of the opinion that the petition to alter the decree should have been disposed of before the appeal was taken, and that no appeal could be taken until that motion was disposed of." The logical converse of this rule is demonstrated by those cases holding that a trial court may not entertain a motion for a new trial after jurisdiction of the appellate court has attached. Commentary to Rule 31 (c) Federal Rules of Criminal Procedure, Preliminary Draft.

Adherence to this rule would seem to be an elemental principle in the conservation of judicial effort. This case could well be affirmed without further discussion on this theory alone.

II

The trial court did not commit error in denying the motion for a new trial.

(a) It was not plainly wrong to rule that the affidavit of Marie Belt did not constitute newly discovered evidence.

The affidavit of Marie Belt and the affidavit of appellant herself (App. pp. 6-7) show that it was known to appellant that the affiant was a witness to the event and that this was known to the appellant at the time she went to trial. The docket entries by the Clerk (App. pp. 2-3) show that when appellant was first arraigned on November 7th, she pleaded not guilty and demanded a jury trial, whereupon the case was continued to November 18th. The entries also show that this demand was withdrawn and the case tried that same day, resulting in conviction. Obviously, appellant was not hurried into trial against her desire. No attempt was made to subpoena this Marie Belt, nor was any request made of the Court that the case be passed or continued so that Marie Belt could be produced.

Appellee submits that the testimony of this witness does not constitute "newly discovered evidence" as that term is known to the law. Appellant knew that this person had witnessed the occurrence, and knew, or believed, that the witness was temporarily unavailable. Yet she did not ask for a con-

tinuance, nor attempt to subpoena the witness. The absence of a material witness is a ground for continuance ("Continuance" 12 Am. Jur. 464, sec. 23), but if a party fails to subpoena a known witness or to ask for a continuance on the ground of the witness' necessary absence, his motion for a new trial is properly overruled. (*State v. Hubbard*, 126 Kan. 129, 132, 266 P. 939, 941 (1928); *State v. Gumm*, 141 Wash. 355, 251 P. 273 (1926); "New Trial" 39 Am. Jur. 57, sec. 37.)

(b) The decision of the trial Court that the affidavit of Thelma Matthews did not state facts which would require a different result was not "plainly wrong."

This affiant, Thelma Matthews, averred that she saw appellant called to a car occupied by police officers on Friday night, November 6, 1942; that one of them grabbed appellant's pocketbook and pushed her in the car; and that appellant did not know that the affiant witnessed the occurrence. Appellant's affidavit also averred that she had not known Thelma Matthews had witnessed the occurrence until after she was released on bond subsequent to her conviction (App. p. 7).

In considering this affidavit, certain additional rules of law become applicable. In addition to the requirement that evidence in support of a motion for a new trial must be in fact "newly discovered," such evidence must also not be merely cumulative and must be of such character that on a new trial it would probably produce an acquittal. *Johnson v. United States*, 8 Cir., 32 F. (2d) 127, 130 (1929); *Boyd v. United States*, 9 Cir., 30 F. (2d) 900, 901 (1929); *Prisament v. United States*, 5 Cir., 96 F. (2d) 865, 866 (1938). Evidence is cumulative which merely multiplies witnesses to facts already sworn to on the trial (*Howe v. State*, 177 S. W. 497, 500, 77 Tex. Cr. 108 (1915)). The statement of Thelma Matthews is, at best, a repetition of some of the facts testified to by appellant, namely, that she was called to a police cruiser, seized and pushed inside.

Taking a less favorable view of this affiant's statement, however, it is equivocal. Presumably appellant had acquainted this witness with the necessity of proving that nothing had

transpired between her and the police officer. The affidavit, however, does not state that appellant was not in the company of a police officer before being hailed by the police cruiser. The meagre statement of this affiant is not, in fact, necessarily inconsistent with the version of officer Allen, and apparently the trial Court so resolved the matter for his Certificate (App. pp. 15-16) read in part as follows:

Upon the consideration of the affidavit of said Thelma Matthews, I, as trial judge, ruled that the statements therein contained did not constitute grounds for a motion for a new trial because of alleged newly discovered evidence, for the following reasons: That the testimony of the arresting officer was that he had been solicited by the defendant and had placed her under arrest; that at the time of the arrest a police cruiser was driving past and witness hailed it and put the defendant into the car and took her to No. 4 police station; that the affidavit of Thelma Matthews did not aver where she was at the time; did not deny or contradict the testimony of the officer that he had been solicited by the defendant; that it simply averred that she saw one officer grab the pocketbook of the defendant and push her into the car. I ruled that the car into which Thelma Matthews swears she saw the defendant pushed could have been the police cruiser testified to by the arresting officer, and that the officer whom Thelma Matthews swears pushed the defendant into the car could have been the arresting officer pushing the defendant into the police cruiser after he had been solicited and after he had arrested the defendant. I stated that in my opinion the evidence of Thelma Matthews, as set forth in the affidavit, was not such as ought to produce a different result on the merits of another trial.

If the averments of Thelma Matthews be taken as the literal truth, can it be said that they constitute such evidence as would probably produce an acquittal on a new trial? (*Johnson v. United States*, 8 Cir., 32 F. (2d) 127, 130 (1929)). Appellee submits that the answer must be in the negative.

The criterion of review of judgments of the Municipal Court in cases tried without a jury is whether the judgment is "plainly wrong or without evidence to support it" (Sec. 11-772 (c), D. C. Code (1940)). The view taken by the trial Court of the affidavit of Thelma Matthews is not such and should not be disturbed. It is a typical case where the discretion traditionally exercised by trial courts takes on significance. The trial Court here heard the evidence and is best situated to evaluate the probative effect of a new offer of evidence. Where there is more than one possible result, it is a practical nullification of judicial discretion to say that one or the other is the only reasonable choice. There never will be a case where all the factors which enter into an evaluation of evidence can be reproduced in the record.

III

The Municipal Court of Appeals did not err in requiring the trial Court to supplement the record by certifying whether the motion for a new trial was denied on the merits or a procedural point.

As previously stated (*supra*, p. 2), the contention that the trial Court denied a new trial on a procedural ground rather than on the merits was first raised by appellant at oral argument in the Municipal Court of Appeals. Appellant had not prepared a record to sustain this contention. The Municipal Court of Appeals entertained the contention, but advised counsel at that time that it would have to order the trial Court to certify the true fact. Furthermore, a formal order to the Trial Court was entered on March 1, 1943 (App. p. 14), and counsel for the appellee, at least, received the usual mailed notice from the Clerk of the Municipal Court of Appeals of the action taken by the Court on that day. Yet appellant contends before this Court that all this was done without notice to her (Brief, p. 6). It would seem that such a contention is made with poor grace after the appellate court has made such a painstaking effort to pass on contentions first made at oral argument.

The Municipal Court of Appeals Rule 31 provides for such contingencies as occurred in this case:

If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to this court, or this court, on a proper suggestion or of its own initiative, may direct that the omission be supplied or misstatement corrected; and, if necessary, that a supplemental record shall be certified and transmitted by the clerk of the trial court.

This rule is but a counterpart of Federal Rule of Civil Procedure 75 (h) and is similar to Rule 9 of the Rules in Criminal Cases, promulgated by the Supreme Court of the United States. The latter reads in part as follows:

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

Appellant's failure to object to the Municipal Court of Appeals' notice that it would order a supplemental record would seem the equivalent of a motion, if such be required.

After the certificate of the trial Judge had been filed in the appellate cause, appellant filed a paper entitled "Objection to Certificate of Trial Judge" (App. 24-25). In this paper, appellant purported to "certify" to the appellate Court that the motion was denied for the reason that appellant was at liberty on an appeal bond. This paper was properly ignored. The place to make up a record is in the trial court. It is the trial court that certifies a bill or exceptions or other statement of proceedings, not a litigant. An honest difference of opinion as to what occurred must be settled in the trial court, and the appellate court will not accept an uncertified statement by the appellant in lieu of a certified record. Appellant should have presented his "Objections" to the trial Court (*Clawans v. White*, 71 App. D. C. 362, 112 F. (2d) 189 (1940)).

IV

a. The judgment of conviction of soliciting prostitution was not plainly wrong or without evidence to support it.

Appellant contends (Br. p. 10) that the evidence does not show soliciting on the part of appellant, and also contends that she was entrapped. The issue of entrapment was not raised in the trial Court and therefore will not be heard on appeal (*United States v. Ginsburg*, 7 Cir., 96 F. (2d) 882, 886 (1938), *cert. denied*, 305 U. S. 620).

Even if the issue had been raised under the plea of "not guilty," as it could have been (*Sorrels v. United States*, 287 U. S. 435 (1932)), the testimony of officer Allen does not show entrapment but only the affording of an opportunity for appellant to make her offer. The only act on his part which might have contributed to the solicitation was a disclaimer of official status, i. e., "I'm no policeman." This was not entrapment but the employment of deception to afford an opportunity for the commission of crime. The criminal intent did not originate with the officer, for he was investigating a possible illegal traffic in narcotics according to his testimony. The intent originated with appellant, and it is not entrapment to afford her an opportunity to express it. (Notes) 86 A. L. R. 264; 66 A. L. R. 479; 18 A. L. R. 146.

b. The judgment of conviction of possession of numbers slips is uncontradicted.

The conviction of possession of numbers slips could not be affected by any of the points argued here by appellant. The only bearing on this point of any of appellant's argument is that if there was no solicitation of prostitution, presumably the arrest would be illegal as well as the subsequent search which disclosed the numbers slips. But the defense of illegal search and seizure was never raised in the trial Court in opposition to the numbers charge. Appellant nowhere argues the point, but even if she did the objection would come too late. A motion to suppress evidence must be timely raised. It is too late even if raised at trial except upon a showing that defendant had no opportunity to raise it previously (*Smith v.*

United States, 72 App. D. C. 187, 188, 112 F. (2d) 217, 218 (1940)). Certainly, then, it will not be entertained on appeal. The conviction on the numbers charge should be affirmed regardless of the disposition of the conviction of soliciting prostitution.

CONCLUSION

The appeal in this case was premature. The judgment of conviction was not final for purposes of appeal until the motion for a new trial was disposed of. As the appeal was noted prior to denial of the motion for a new trial, no jurisdiction to entertain the appeal was ever acquired by the Municipal Court of Appeals.

The motion for a new trial was properly overruled. The affidavit of Marie Belt did not show newly discovered evidence, and that of Thelma Matthews was not such as to convince the trial Court that a different result would probably be required at a new trial.

The appellant was given ample opportunity to participate in making up a supplemental record in the trial Court. He did not follow that course but attempted to contravert the certified record in the appellate Court. This was improper.

The conviction of soliciting prostitution is not plainly wrong. No entrapment appears in fact, and the objection was not timely made. The conviction on the numbers charge is not open to attack.

The judgment should be affirmed.

Respectfully submitted.

EDWARD M. CURRAN,
United States Attorney.
CHARLES B. MURRAY,
JOHN P. BURKE,
RAY L. JENKINS,
Assistant U. S. Attorneys.